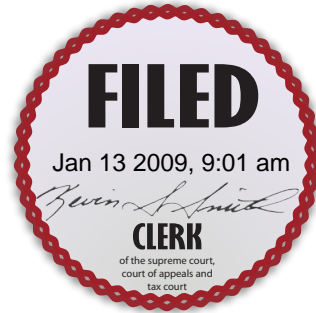


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

BRENT R. DECHERT
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Special Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM M. SIMS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)

No. 34A02-0808-CR-774

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0712-FA-00908

January 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

William M. Sims (“Sims”) pleaded guilty in Howard Superior Court to Class B felony dealing in cocaine and was sentenced to fifteen years, with five years suspended to probation. Sims appeals and claims that the trial court erred in sentencing him. We affirm.

Facts and Procedural History

On September 19, 2007, Sims sold two bags of cocaine to a confidential informant working for the police. These transactions occurred within the Dunbar Court housing development in Kokomo, Indiana. As a result of this transaction and three other controlled buys involving Sims, the State charged Sims on December 3, 2007, with three counts of Class A felony dealing in cocaine and one count of Class B felony dealing in cocaine. On June 17, 2008, Sims entered into a plea agreement with the State whereby he agreed to plead guilty to one count of Class B felony dealing in cocaine. In exchange, the State agreed to dismiss the remaining charges and an unrelated charge for driving while suspended. The plea agreement left sentencing within the trial court’s discretion.

At a sentencing hearing held on July 23, 2008, the trial court found the following aggravating factors: (1) that Sims had a minor criminal history; (2) that Sims’s sale of cocaine was purely for profit, and not to support Sims’s own cocaine habit; (3) that Sims had been dealing cocaine on a regular basis and had the reputation for being a drug dealer; (4) that Sims indicated in the pre-sentence investigation report (“PSI”) that he had no recollection of the events leading to his conviction, indicating a lack of remorse; (5) that despite Sims’s claim that financial difficulties had led him to dealing drugs, Sims had

fathered another child; and (6) that Sims admitted to using marijuana while awaiting sentencing. The trial court found no mitigating circumstances. Sims argued that his sentence should be wholly suspended or served on in-home detention, to which the trial court responded:

I think we have two kinds of dealers in this community. One are the addicts who are supporting their own habit, and that is understandable because . . . crack cocaine is one of the most insidious drugs ever invented. I've seen women give up their children, I've seen people give up everything that is of any value whatsoever in order to feed that habit. I understand somebody who sells to an undercover informant in order to get a little bit for themselves. . . . I don't understand people who sell purely for profit. In-home detention is not something that's appropriate in this circumstance.

Tr. p. 59-60. The trial court then sentenced Sims to fifteen years, with ten executed and five suspended to probation. Sims now appeals.

Discussion and Decision

Sims claims that the sentence imposed by the trial court is erroneous in several respects. As explained by our supreme court, “sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218. An abuse of discretion occurs where the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id. A trial court may abuse its discretion by wholly failing to issue a sentencing statement, or by issuing a sentencing statement that bases a sentence on reasons that are not supported by the record, that omits reasons both advanced for consideration and clearly supported by the record, or that includes

reasons that are improper as a matter of law. Id. at 490-91. However, under the post-Blakely amendments to our sentencing statutes, a trial court can no longer be said to have abused its discretion by improperly weighing or balancing aggravating and mitigating circumstances. Id. at 491.

In the present case Sims specifically claims that: (1) the trial court found aggravating factors which were not supported by the record; (2) the trial court failed to find mitigating factors which were clearly supported by the record; and (3) his sentence is inappropriate in light of the nature of the offense and the character of the offender. We address each of these arguments in turn.

I. Aggravating Factors

Sims claims that the trial court found aggravating factors which were not supported by the record.¹ The first aggravating factor which Sims claims is unsupported by the record is Sims's refusal to accept responsibility for his actions. The trial court based its finding on the fact that during the preparation of the PSI, Sims told the probation officer that he was "unaware" of the facts of the case. On appeal, Sims points out that he pleaded guilty and stipulated to the facts contained in the probable cause affidavit, thereby demonstrating his acceptance of responsibility and remorse.

¹ In making this argument, Sims cites to Blakely v. Washington, 542 U.S. 296 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000), claiming that "[t]he law is clear that a court may not use factors that are not . . . admitted by the Defendant or found by a jury to aggravate a sentence." Br. of Appellant p. 9. Sims, however, was sentenced under the post-Blakely advisory sentencing statutes. See Anglemyer, 868 N.E.2d at 491 n.9. Under the advisory sentencing statutes, the trial court may impose any sentence authorized by statute "regardless of the presence or absence of aggravating or mitigating circumstances." Id. at 489 (quoting Ind. Code § 35-38-1-7.1(d)). Thus, it is now impossible to increase the penalty for a crime beyond the statutory maximum, and there can be no Blakely violation. See id.; Miller v. State, 884 N.E.2d 922, 926 (Ind. Ct. App. 2008), aff'd on reh'g, 891 N.E.2d 58.

Normally, the fact that Sims pleaded guilty should have been considered as an acceptance of responsibility. See Francis v. State, 817 N.E.2d 235, 237 (Ind. 2004) (a guilty plea demonstrates a defendant's acceptance of responsibility and extends a benefit to the State). However, Sims's claim to not remember the facts of the instant crime could be considered by the trial court to lessen any mitigating weight to be given the guilty plea. Indeed, the significance of a guilty plea as a mitigating factor will vary from case to case. Id. at 238 n.3.

Further, it is well established that a guilty plea is not significantly mitigating where the defendant has received a substantial benefit from it or where the evidence of guilt is such that the decision to plead guilty is merely a pragmatic one. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. In exchange for his plea of guilty to one Class B felony, the State dismissed the remaining charges against Sims, which included two Class A felony charges of dealing in cocaine. Thus, Sims already received a substantial benefit from his plea, and the trial court's failure to consider Sims's plea as an acceptance of responsibility is at most harmless error. See Banks v. State, 841 N.E.2d 654, 658-59 (Ind. Ct. App. 2006), trans. denied.

Sims further notes that he testified at the sentencing hearing that he made a "mistake" and that cocaine was "bad" and that cocaine dealing was "bad" for society. However, the trial court was under no obligation to credit Sims's statements as an expression of true remorse. Corrales v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004) (holding that trial court is in the best position to determine whether defendant's remorse is genuine).

Sims next claims that the trial court erred in considering Sims's prior criminal history as an aggravator. Although framing his argument as being a claim that this aggravator is not supported by the record, Sims admits that he has a prior criminal history. But he claims that his criminal history is relatively minor and should not be considered a significant aggravator.² In other words, Sims does not claim that his criminal history is not supported by the record but instead claims that the trial court gave this factor inappropriate weight. However, the trial court specifically noted that Sims's criminal history was relatively minor, indicating that the court did not afford this factor significant weight. More importantly, pursuant to Anglemyer, under the advisory sentencing statutes, a trial court can no longer be said to have abused its discretion by improperly weighing or balancing aggravating and mitigating circumstances. 868 N.E.2d. at 491.

Sims also claims that the trial court's statement that Sims was selling cocaine for money and seemed not to care about the harm he was causing is unsupported by the record. The State argues that the trial court's statements were simply in response to Sims's testimony that he understood the harm caused by cocaine, and explain why the trial court did not believe Sims's testimony. We are inclined to agree. It does not appear that the trial court considered the harm caused by cocaine as a separate aggravator, but

² Sims's prior criminal history consists of one Class C misdemeanor conviction.

was merely explaining why it did not agree with Sims that in-home detention was appropriate.³

Sims argues that several other aggravators found by the trial court are not supported by the record. Specifically, Sims challenges the trial court's findings that he was dealing in cocaine on a regular basis, or at least had the reputation of being a cocaine dealer. Sims also attacks as unsupported the trial court's statement that Sims had repeatedly dealt cocaine to a confidential informant. The State apparently concedes that these facts were not in the facts as admitted by Sims,⁴ but claims that the remaining aggravating factors, some of which Sims does not challenge on appeal, are sufficient to support the sentence imposed by the trial court. We agree with the State.

Even if Sims is correct that the trial court relied on some improper aggravating factors, the remaining aggravators are sufficient to support the fifteen year sentence imposed by the trial court. Sims does not deny that he used illicit drugs, i.e. marijuana, while awaiting sentencing. Further, Sims does not deny that he has at least a minor criminal history. Both of these factors indicate that Sims has a problem conforming his behavior with the law, even after he had been charged with three felonies. Sims's apparent recalcitrance during the pre-sentencing investigation was also supported by the record. These aggravating factors alone support Sims's fifteen year sentence. Thus, any error in the trial court's finding of additional aggravators is harmless. See Cox v. State,

³ In any event, even if this was a separate aggravator which was unsupported by the record, as explained below, the presence of the remaining valid aggravators supports Sims's sentence.

⁴ The State does not address the question of whether facts must be admitted by the defendant at a guilty plea hearing in order to be supported by the record for purposes of sentencing.

780 N.E.2d 1150, 1156 (Ind. Ct. App. 2002) (noting that a single aggravating factor may justify an enhanced sentence).

II. Mitigating Factors

Sims claims that the trial court erred by not considering mitigating factors which he claims were clearly supported by the record. See Anglemyer, 868 N.E.2d at 490-91. The first of the allegedly-overlooked mitigators is Sims's guilty plea. However, as explained above, Sims had already received a substantial benefit in exchange for his plea. Therefore, the trial court's failure to consider this as a significant mitigator was harmless. See Wells, 836 N.E.2d at 479; Banks, 841 N.E.2d at 658-59.

Sims also claims that the trial court should have found that the crime was the result of circumstances which were unlikely to recur. See Ind. Code § 35-38-1-7.1(b)(2) (Supp 2008). Sims notes that he testified that he was dealing in cocaine due to financial difficulties and that he only has one prior misdemeanor conviction. We emphasize, however, that the trial court was not obligated to credit Sims's explanation for his criminal behavior. Moreover, Sims's admission that he continued to use illicit drugs while awaiting sentencing does not speak well of his ability to obey the law. This alleged mitigator was therefore not clearly supported by the record.

Sims next claims that the trial court should have considered as mitigating that he "has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before commission of the crime." I.C. § 35-38-1-7.1(b)(6). However, Sims admitted that he has a minor criminal history and admitted to using

marijuana while awaiting sentencing. We therefore cannot say that the record clearly supported this alleged mitigator.

Sims briefly claims that the trial court improperly failed to consider as mitigating that he was “likely to respond affirmatively to probation or short term imprisonment.” I.C. §. 35-38-1-7.1(b)(7). Sims supports this claim with one sentence noting that he has a minor criminal history and “seemed to recognize the severity of his actions.” Br. of Appellant at 14. We repeat that the trial court was under no obligation to credit Sims’s claims of remorse. Moreover, given Sims’s use of marijuana while awaiting sentencing, we cannot say that the trial court should have concluded that Sims would respond well to probation or short-term imprisonment.

Sims next claims that the trial court failed to consider as mitigating that “the character and attitudes of the person indicate that the person is unlikely to commit another crime.” I.C. § 35-38-1-7.1(b)(8). Sims refers again to his alleged remorse and to the testimony of witnesses favorable to him indicating that he was a good father. However, the trial court obviously did not credit Sims’s claims of remorse, and was under no obligation to credit the witnesses called on his behalf. As such, we cannot say that this allegedly-overlooked mitigator was clearly supported by the record.

The last of the mitigators which Sims claims was improperly overlooked by the trial court is that “[i]mprisonment of the person will result in undue hardship to the person or the dependants of the person.” I.C. § 35-38-1-7.1(b)(10). Sims notes that he has five children and will soon be the father of a sixth, and that witnesses testified that his imprisonment would be a hardship to his children and their caretakers.

Our supreme court has explained that “[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Here, Sims does not explain how the hardship resulting from his imprisonment would have been any worse than that suffered by any child whose parent is incarcerated. See Williams v. State, 883 N.E.2d 192, 196 (Ind. Ct. App. 2008). Nor does he explain how his enhanced sentence would impose any more of a hardship than a shorter sentence. See Abel v. State, 773 N.E.2d 276, 280 (Ind. 2002). Therefore, we cannot say that any undue hardship was clearly supported by the record and improperly overlooked by the trial court.

III. Appropriateness of Sentence

Lastly, Sims claims that his sentence is inappropriate in light of the nature of the offense and the character of the offender. This court possesses the constitutional authority to revise a sentence if, after consideration of the trial court’s decision, we conclude that the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2008); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied. Although we are not required under Rule 7(B) to be “extremely” deferential to a trial court’s sentencing decision, we recognize the unique perspective a trial court brings to such determinations. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). It is the defendant’s burden to persuade us that his sentence is inappropriate. Anglemyer, 868 N.E.2d at 494.

Here, we are unable to conclude that, in light of Sims's character and the nature of his offense, a sentence five years over the advisory sentence is inappropriate. Regarding the nature of the offense, Sims admitted to dealing cocaine to a confidential informant while located in a housing development—facts which would have supported a conviction for dealing in cocaine as a Class A felony. See Ind. Code § 35-48-4-1(b)(3)(B)(iii) (2004). With regard to Sims's character, we note that he has a criminal history, was not entirely forthcoming during the pre-sentence investigation, and admittedly used illicit drugs while awaiting sentencing. We emphasize that Sims was not sentenced to the maximum sentence. Instead, the trial court sentenced him to fifteen years—five years below the maximum. And the trial court suspended five years of the fifteen years sentence. Giving due consideration to the trial court's sentencing decision, as we must, we cannot conclude that Sims's fifteen year sentence is inappropriate.

Affirmed.

BAILEY, J., and BARNES, J., concur.